LARRY MORALES, WILLIAM THOMAS, AND T. & M. LAND & CATTLE CO.
v.
JOHN A. BAUDENDISTEL, BRIAN A. BAUDENDISTEL, AND JOHN H. SANKOT

IBLA 86-1241 Decided November 2, 1988

Appeal from a decision by Administrative Law Judge Harvey C. Sweitzer declaring the Margareth Nos. 2 through 11 lode mining claims void for lack of discovery of a valuable mineral deposit.

Affirmed in part, reversed in part.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity

In a private mining claim contest, the burden of proof is on the contestant to establish the invalidity of the claim by a preponderance of the evidence.

2. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

There has been no discovery of a valuable mineral deposit within a lode mining claim unless there has been physically exposed within the limits of the claim the vein or lode-bearing mineral of such quality and quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral. A mining claim is properly declared invalid where there is no evidence concerning the quantity of mineral to be found on the claim and the only evidence of quality establishes the value far below the cost of mining, removing and marketing the mineral.

3. Mining Claims: Withdrawn Land

A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio.

4. Mining Claims: Contests

Patentees under the Stock-Raising Homestead Act of 1916 have an adverse interest sufficient to bring a private contest against allegedly invalid mining claims located for minerals reserved to the United States.

APPEARANCES: John A. Baudendistel, pro se.

OPINION BY ADMINISTRATIVE JUDGE LYNN

John A. Baudendistel has appealed from an April 22, 1986, decision of Administrative Law Judge Harvey C. Sweitzer declaring the Margareth Nos. 2 through 11 lode mining claims null and void in a private contest proceeding initiated by Larry Morales, William Thomas, and the T. & M. Land & Cattle Company (contestants) against John A. Baudendistel (claimant), Brian A. Baudendistel, and John H. Sankot. 1/

The mining claims at issue here are located in sec. 25, T. 9 N., R. 10 E., Mount Diablo Meridian (MDM), El Dorado County, California. This area is classified pursuant to California State law as of the highest potential mineral character because it is crossed by the extensive gold quartz veins commonly referred to as the "Mother Lode." The surface estate has been patented under the Stock-Raising Homestead Act of 1916, with the mineral estate being reserved to the United States. 43 U.S.C. § 299 (1970); this Act was repealed by section 702 of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2789. Contestants, present owners of the surface estate, filed an application to purchase the reserved mineral estate from the United States under the provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), and its implementing regulations in 43 CFR Part 2720. Contestants assert they were told by the Bureau of Land Management (BLM) that they would have to file a private contest action against the mining claims before the reserved mineral estate could be sold.

[1] In a private mining contest, the burden of proof is on the contestant to establish the invalidity of the contested claims by a preponderance of the evidence. Massirio v. Western Hills Mining Association, 78 IBLA 155, 160 (1983). Claimant argues that contestants did not carry their burden of proof because they presented no real evidence.

[2] The ultimate issue in determining the validity of lode mining claims is whether there has been a discovery of a valuable mineral deposit on each of the claims, i.e., whether "minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457 (1894); quoted in Chrisman v. Miller, 197 U.S. 313, 322 (1905). This prudent man test has been complemented by the requirement that the material may be mined, removed and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968); Converse v. Udall,

1/ Neither Brian Baudendistel nor Sankot has participated in these proceedings. At the Feb. 25, 1985, hearing, then-counsel for claimant stated that Sankot had quit-claimed his interest in the claims to "Mr. Baudendistel" (Feb. Tr. at 5). John Baudendistel has made no assertion that he represents Brian Baudendistel.

399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). As to lode claims, the test includes exposure of the mineral within the veins. "[T]here must be physically exposed within the limits of the claim the vein or lode-bearing mineral of such quality and of such quantity as to justify the expenditure of money for the development of a mine and the extraction of the mineral." Thomas v. Morton, 408 F. Supp. 1361, 1371 (D. Ariz. 1976), aff'd 552 F.2d 871 (9th Cir. 1977), quoting Thomas v. DeVilbiss, 10 IBLA 56, 63 (1973). See also United States v. Foresyth, 100 IBLA 185, 94 I.D. 453 (1987).

A hearing in this matter was held on February 25, April 16, and July 16, 1985, 2/ before Administrative Law Judge L. K. Luoma. 3/ Evidence was presented at the hearing relating to claimant's alleged discoveries on Margareth Claims Nos. 4, 6, 7, 9, and 11. 4/ During June and July 1985, claimant, with the assistance of Steve Woznack, an individual without formal academic education in mining but with 10 years experience in mining and construction, dug trenches with a backhoe across areas on the claims where he believed he could find vein structures. Examination of these trenches by both contestants and claimant provided most of the evidence presented at the hearing.

In support of their contention that these claims are invalid, contestants offered into evidence the testimony of John Moon, a professional mining engineer with approximately 40 years of experience in the business, who evaluated the claims in connection with contestants' application to acquire the reserved mineral rights from the United States. The undated report resulting from Moon's examination was submitted into evidence. Moon updated his earlier report by examining the trenches claimant dug in June and July 1985. The substance of his testimony, based on the examination of that work, was that none of the trenches showed any evidence of goldbearing quartz veins or mineralization, and there was no other evidence of a discovery within the boundaries of the claims. Moon indicated he had taken no samples from the claims for assay because he had seen nothing worth assaying.

Contestants also offered evidence, through Moon, that operating expenses for an underground mining operation 5/ would be approximately

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2/ The February hearing related solely to problems claimant alleged he was having gaining access to the mining claims. Contestants' case in chief was presented at the April hearing. Claimant's case and contestants' rebuttal case was the subject of the July hearing.

3/ The case was transferred to Judge Sweitzer when the Sacramento Office of the Office of Hearings and Appeals, in which Judge Luoma served, was closed before Judge Luoma had written the decision in this case. See United States v. McMullin, 102 IBLA 276, 278-79 (1988).

4/ Margareth Claims Nos. 2, 3, 5, 8, and 10 will be considered separately, infra.

5/ There was no dispute that mining operations on the claims would have to be underground because of El Dorado County restrictions on open-pit mining.

$ 100 per ton of material removed, not including the initial costs of opening the mine. Moon also testified that an underground mining operation would require the removal of significant amounts of material not bearing the mineral for which mining was being conducted in order to allow adequate work space and support structures. Moon, therefore, concluded that the actual return per ton of material removed would be reduced even more.

Claimant and Woznack testified that veins were present in most of the trenches and that samples taken from the trenches, when examined by the fire assay method, showed gold concentrations ranging from 0.001 to 0.044 ounces per ton. At the time the assays were performed, gold had a value of $ 316.30 per Troy ounce. The samples thus showed values ranging from $ 0.32 to $ 13.92 per ton. 6/ Claimant offered no evidence concerning the potential costs of mining.

Judge Sweitzer examined the conflicting evidence and testimony and concluded at page 13 of his decision:

> Given these uncontested costs [of mining], the mineral deposits presently exposed clearly cannot be extracted, removed, and marketed at a profit. At best, contestees show a loss of $ 86 per ton of material mined. Contestants have shown by a preponderance of the evidence that no valid discovery exists on * * * claims [Nos. 4, 6, 7, 9, and 11]. Consequently, the Margareth Nos. 4, 6, 7, 9, and 11 claims are declared void.

On appeal, claimant argues that contestants have not proven by a preponderance of the evidence that minerals are not present on the Margareth Claims Nos. 4, 6, 7, 9, and 11. A contestant in a private mining claim contest is not required to prove that minerals are not present on the claim. Rather, the contestant must merely show, by a preponderance of the evidence, that there has been no discovery of a valuable mineral deposit. At best the evidence in the record, including both claimant's testimony and evidence from a geologist who examined the property for him, is that there might be valuable mineral deposits on some or all of claims 4, 6, 7, 9, and 11, but, if such deposits do exist, they have not yet been discovered. Further exploration would be required before any possible discovery could be made on these claims. See Barton v. Morton, 498 F.2d 288 (9th Cir.), cert. denied 419 U.S. 1021 (1974). If further exploration is necessary, a discovery has not been made.

6/ Judge Sweitzer's decision stated that gold values had increased approximately 10 percent since the time the assays were prepared, and thus he determined that the value at the time of his decision ranged from $ 0.50 to $ 20 per ton. These figures appear to give claimant the benefit of every doubt. Assuming a strict 10-percent increase in the price of gold, the amounts of gold reported in the assays would actually be in a range of only $ 0.35 to $ 15.31 per ton. Even assuming that the price of gold has doubled since the assays were performed, the value of the gold contained in the samples would still range only from $ 0.63 to $ 27.83 per ton.

Therefore, Judge Sweitzer's conclusion that the Margareth Claims Nos. 4, 6, 7, 9, and 11 are void for lack of a valuable discovery is affirmed.

Claimant did not allege discoveries on the Margareth Claims Nos. 2, 3, 5, 8, and 10. At the April 16, 1985, hearing, Judge Luoma asked claimant, who was representing himself, whether he understood that he needed to show his mineral discoveries on each of the claims. Claimant responded: "Yes, your Honor. Some of those I can't because they're into mineral withdrawal. But I can show the mineralization on 11, 7, 6, 4 and 9. Those are the ones in question" (Apr. Tr. at 88).

Judge Sweitzer held in his decision at pages 11-12:

> [C]ontestants have satisfied this burden [of proof of invalidity] as to the Margareth Nos. 2, 3, 5, 8, and 10 claims through a diligent field examination of the property for any signs of mineral exposure or discovery pits, and an examination with a ten-power hand lens of any exposed quartz. Assays need not be taken under these circumstances in order to preponderate, since in the witness' expert opinion there was no exposed material that warranted an assay analysis (April 16, 1985 Tr. 56). With this evidence alone contestants have preponderated. In addition, at the April 16, 1985 hearing, contestee expressly denied any assertion of discoveries on the Margareth Nos. 2, 3, 5, 8, and 10 claims and stated that he could only show mineralization on the Margareth Nos. 4, 6, 7, 9, and 11 (April 16, 1985 Tr. 88). I hold that as to the Margareth Nos. 2, 3, 5, 8, and 10 claims, the contestants have established by a preponderance of the evidence that no discovery exists; therefore, the Margareth Nos. 2, 3, 5, 8, and 10 claims are declared void.

On appeal, claimant apparently argues that he could not show a discovery on Margareth Claims Nos. 2, 3, 5, 8, and 10 because the lands on which these claims were located were withdrawn from mineral entry by Public Land Order (PLO) 2729, July 17, 1962. He also argues that Margareth Claim No. 8 is on BLM land, not land of which the surface is patented to contestants. For purposes of this discussion, Margareth Claims Nos. 2, 3, 5, and 10 will be treated separately from Claim No. 8.

PLO 2729, published at 27 FR 6938 (July 21, 1962), provides for withdrawal of certain public lands for the use of the Bureau of Reclamation, Department of the Interior, in connection with the development, operation, and maintenance of the Central Valley Project. Section 2 of that order states in pertinent part:

> The withdrawal from entry under the mining laws made by this order shall apply to the minerals in the following lands which have been patented under the Stockraising Homestead Act of December 29, 1916 (39 Stat. 862), with a reservation of minerals to the United States:

Mount Diablo Meridian

* * * * * * *

T. 9 N., R. 10 E.

Sec. 25, lots 1, 2, 3, and 4.

The Department's master title plat for T. 9 N., R. 10 E., MDM, shows lots 1 through 4 of sec. 25 as being located in the W 1/2 SW 1/4 and SW 1/4 NW 1/4 of sec. 25. The master title plat further shows that lots 1 through 4 were withdrawn pursuant to PLO 2729. The remaining acreage in the W 1/2 SW 1/4 and SW 1/4 NW 1/4 is taken up by a patented mining claim, described in the testimony as the Adams Gulch Claim.

The record contains copies of claimant's location notices for the Margareth Claims Nos. 2, 3, 5, and 10. These location notices show that the claims were located in the W 1/2 SW 1/4 and SW 1/4 NW 1/4 of sec. 25 on June 22 and July 12, 1982.

[3] Claimant's justification for not making a showing of a discovery on the Margareth Claims Nos. 2, 3, 5, and 10 was that he could not go on these claims because they were withdrawn from mineral entry. The record indicates that the land was withdrawn 20 years before the claims were located. A mining claim located on land previously withdrawn from appropriation under the mining laws is null and void ab initio. Coeur Explorations, Inc., 100 IBLA 293 (1987); George E. Krier, 92 IBLA 101 (1986). Claimant's reason for not showing a discovery on the Margareth Claims Nos. 2, 3, 5, and 10 suggests that these claims were actually void ab initio.

In any event, therefore, the Margareth Claims Nos. 2, 3, 5, and 10 were properly declared void.

Claimant contends that the Margareth Claim No. 8 is located on BLM land rather than on land the surface of which is patented to contestants. The record shows this [**13] claim is located in W 1/2 SW 1/4 NE 1/4 and SW 1/4 NW 1/4 NE 1/4 of sec. 25, T. 9 N., R. 10 E., MDM. Contestants' Exhibit 3, introduced at the hearing before Judge Luoma, contains Figure 1, which shows the location of contestants' property. That figure clearly shows that contestants do not claim ownership of the surface of the land within the Margareth Claim No. 8. Similarly, the master title plat for T. 9 N., R. 10 E., MDM, does not show a patent for the surface of the land encompassed by the Margareth Claim No. 8.

[4] As discussed in Judge Sweitzer's decision at page 4, a Stock-Raising Homestead patentee, or the successor in interest, has standing to bring a private contest against a mining claimant because, as the holder of the surface estate, the patentee has an interest adverse to that of the mining claimant. Massirio, supra; Sedgwick v. Callahan, 9 IBLA 216 (1973), quoted in Thomas v. Morton, supra. If, however, the person or persons bringing a private contest do not own the surface estate or otherwise have an interest in it, there is no standing to bring a private contest.

Contestants assert only rights arising from their Stock-Raising Homestead patent. The record contains no evidence that their patent extends to the area encompassed by the Margareth Claim No. 8. In the absence of evidence of contestants' interest adverse to the Margareth Claim No. 8, contestants lack standing to bring a private contest against this claim.

Accordingly, that portion of Judge Sweitzer's decision finding that the Margareth Claim No. 8 was void for lack of a valuable mineral discovery must be reversed and the contest against that claim dismissed. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

Kathryn A. Lynn
Administrative Judge
Alternate Member

I concur:

Will A. Irwin
Administrative Judge

7/ Neither PLO 2729 nor the master title plat indicates that the area encompassed by the Margareth Claim No. 8 has been withdrawn.